

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

ATIQULLAH V. EL-TOUNY

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ATIQUE ATIQULLAH, APPELLANT,
V.
SAMIA EL-TOUNY, APPELLEE.

Filed May 15, 2012. No. A-11-630.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge.
Affirmed.

Atique Atiqullah, pro se.

Patrick A. Campagna, of Lustgarten & Roberts, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Atique Atiqullah appeals an order of the district court for Douglas County, Nebraska, dismissing Atiqullah's motion to modify a prior custody and visitation order and granting Samia El-Touny's cross-motion to modify visitation. On appeal, Atiqullah assigns a variety of errors allegedly committed by the district court in denying his motion for modification and in granting his ex-wife's cross-motion. We find no merit to these various assertions, and we affirm. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

II. BACKGROUND

On February 4, 2000, the district court entered a decree dissolving the marriage of Atiqullah and El-Touny. In that decree, the court awarded the parties joint legal custody of their one minor child, who was born in May 1996; awarded primary physical custody to El-Touny; and awarded visitation to Atiqullah.

On November 3, 2009, Atiqullah filed an application to modify the decree. In his application, Atiqullah alleged that the decree had previously been modified on several occasions and that, in the prior modifications, the court had modified Atiqullah's visitation rights. El-Touny noted in her responsive pleading that prior modification orders had occurred on May 8, 2001, and September 29, 2003. She also noted that the September 2003 modification resulted in her being awarded sole custody and that in November 2005, the court entered an order denying a prior application by Atiqullah seeking custody of the minor child.

In her responsive pleading, El-Touny sought to modify Atiqullah's visitation rights. El-Touny alleged that the minor child had alleged Atiqullah had engaged in inappropriate physical discipline and that the child was refusing visitation with Atiqullah, that child protective services had investigated and advised El-Touny that unsupervised visitation would not be in the child's best interests, and that Atiqullah was continuing to file harassing applications to modify the decree.

After conducting hearings, during which Atiqullah appeared pro se and El-Touny appeared with counsel, the court entered an order dismissing Atiqullah's motion to modify. The court found that the evidence adduced during the hearings indicated that El-Touny had not interfered with visitation and had encouraged it and that the minor child did not want visitation and was afraid of Atiqullah. The court also granted El-Touny's cross-motion to modify and ordered that the child would not be required to visit with Atiqullah unless the child wanted visitation. This appeal followed.

III. ANALYSIS

1. ISSUES RAISED ON APPEAL

Atiqullah's pro se brief on appeal includes 20 assignments of error. These assignments of error include a variety of assertions, including claims that the district court erred in its factual and legal conclusions; erred in "not being impartial" and instead being "biased, prejudice [sic] and hateful"; erred in not allowing Atiqullah to compel El-Touny's counsel to testify as a witness; erred in denying Atiqullah's various offers of evidence; erred "to read its fake Decree written by a dishonest attorney [El-Touny's counsel] before signing it"; and erred in not requiring El-Touny to adduce various evidence. Brief for appellant at 25. Atiqullah also makes other assignments of error from which it is difficult to discern any meaning, including the following: "The trial Court erred to realize that how the Petitioner/Appellant can participate in a deposition that he didn't know anything about the history of the matter?" Brief for appellant at 27.

The argument section of Atiqullah's pro se brief contains a variety of assertions that address some, but not all, of the myriad assignments of error provided in the brief. The argument section includes no references or citations to any legal authority, no discussion of any legal standards or legal basis for relief, and consists largely of a variety of rhetorical questions. Although Atiqullah's brief includes a table of authorities that includes a list of approximately eight Nebraska cases and a case decided under the "Hague [C]onvention" concerning international child abduction, these authorities are never mentioned, cited, or discussed anywhere in the brief. Brief for appellant at 3 (emphasis omitted). In short, the brief contains no legal authority or analysis to support any assertion of error that Atiqullah has purported to raise.

Because of the manner in which the assignments of error have been raised, the manner in which argument was presented, and the dearth of any legal authority or analysis, we construe Atiqullah's brief on appeal as simply asserting that the district court erred in finding that he failed to adduce sufficient evidence to support modification of custody and in finding that El-Touny's cross-application to modify visitation should be granted.

2. ANALYSIS

(a) Atiqullah's Motion to Modify

A number of Atiqullah's assignments of error and assertions in his brief concern the district court's finding that he failed to adduce sufficient evidence to demonstrate a material change of circumstances warranting modification of the prior custody order. Our review of the record reveals no error.

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Id.*

The party seeking modification bears the burden of showing a change in circumstances. *Id.* Evidence of a material change in circumstances warranting modification of a dissolution decree must be proved at trial and contained in the record on appeal. *Id.* A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the prior decree, would have persuaded the court to decree differently. *Id.*

In this case, the court conducted a November 2009 hearing on an application for contempt filed by Atiqullah, an April 2010 hearing on a motion to restrict international travel filed by Atiqullah, and hearings in October 2010 and January 2011 specifically on the cross-motions for modification. Throughout those hearings, Atiqullah attempted to adduce a variety of evidence concerning the minor child's performance in school and disciplinary issues. Much of this evidence, however, concerned time periods dating back several years prior to the most recent application for modification. The evidence generally established that the minor child has experienced relatively consistent difficulties in school, but it did not establish that there had been any material change in the circumstances that warranted modification of custody.

The evidence adduced did not demonstrate that El-Touny's custody of the child or Atiqullah's limited visitation with the child was a substantial factor in the educational and disciplinary difficulties experienced by the minor child. Indeed, as discussed more fully below, the evidence tended to establish that the minor child had experienced substantial stress related to visitation with Atiqullah and related to having to testify in the repeated proceedings brought by Atiqullah to modify the custody and visitation orders.

Throughout the hearings, Atiqullah repeatedly attempted to adduce documentary evidence concerning the child's educational records over the past several years. The court repeatedly indicated that the evidence was not being properly marked or offered, that proper foundation for its admission was not being adduced, and that it appeared to largely concern time periods that had already been addressed in prior modification proceedings. Atiqullah repeatedly

asserted that he was being treated unfairly by the court's insistence that rules of evidence, relevancy, and admissibility be followed.

Atiqullah repeatedly asserted that the minor child's difficulties were El-Touny's fault and were related to less contact with Atiqullah and questioned various witnesses during the hearings in an attempt to support those assertions. The various witnesses and the documentary evidence Atiqullah attempted to adduce, however, did not demonstrate support for Atiqullah's assertions. Although the testimony and evidence tended to suggest that there has been no material change in circumstances, at the very least, the evidence demonstrated a factual dispute about the role that contact between the minor child and Atiqullah has on the minor child and his educational and behavioral difficulties. Although in conducting a de novo review an appellate court reaches a conclusion independent of the trial court, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Smith-Helmstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997).

Our de novo review of the record reveals no abuse of discretion. We find no error in the district court's conclusion that Atiqullah failed to demonstrate a material change of circumstances warranting modification of custody or increasing his visitation rights with the minor child. There is no merit to Atiqullah's various assertions to the contrary on appeal.

(b) El-Touny's Cross-Motion to Modify

A number of Atiqullah's assignments of error and assertions in his brief appear to concern the district court's finding that it was appropriate to modify Atiqullah's visitation rights and to order that the minor child need not participate in visitation unless he wanted to or was no longer in fear of Atiqullah. Our review of the record reveals no error.

Throughout his brief, Atiqullah takes issue with the district court's finding that El-Touny had not interfered with his visitation with the minor child and that the minor child had resisted visitation out of fear of Atiqullah. These findings were directly supported by the minor child's own testimony during the hearings.

The minor child testified that El-Touny had encouraged him to have visitation with Atiqullah and that she would allow him to have visitation with Atiqullah any time he wanted to. He testified that she had never told him that he could not visit Atiqullah. He testified that he did not want to see Atiqullah or participate in visitation with Atiqullah and testified that Atiqullah had subjected him to verbal and physical abuse. He testified that Atiqullah would be "trying to teach [him] math or . . . Arabic or just anything" and that Atiqullah would hold a piece of metal in his hand approximately 15 inches in length and if he got a math problem incorrect or mispronounced a word, Atiqullah "would just hit [him] with it." He testified that he would be struck "pretty much anywhere" on his body and that during the last 2 years of visitation with Atiqullah, it had happened "almost every time." He also testified to verbal abuse. Finally, he specifically testified that had a fear of spending time alone with Atiqullah, although he felt capable of "stand[ing] up for [him]self now."

Based upon our de novo review of the record, we find no abuse of discretion in the district court's determination that the minor child should not be required to participate in

visitation with Atiqullah if such participation is contrary to the child's wishes or the child fears such visitation. There is no merit to Atiqullah's assertions to the contrary on appeal.

IV. CONCLUSION

Atiqullah has presented a brief on appeal that includes a variety of assertions of error, very little meaningful argument, and no legal authority to support the assertions that there is reversible error in this case. Our de novo review of the record reveals no abuse of discretion by the district court, and we affirm.

AFFIRMED.